IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9523 OF 2004

Shri Shamrao Vishnu Kunjir)
Age 38 years, Occ. Agriculture)
residing at Waghapur, Tal.)
Purandhar, Dist. Pune.)..PETITIONER

Versus

1.Shri Suresh Vishnu Kunjir,)
Age 44 years, Occ.Agriculture)
2.Smt.Chandrabhagha Mahadeo Pawar)
AGe 48 years, Occ.Household)
Sr.No.1 & 2 residing at)
Ghorpadigaon, Survey No.73,)
Near Memane Vasti,Kantakavade)
Vasti, Pune-411 028.)
3.Smt.Suman Badu Chachar,)
Age 36 years, Occ. Household)
residing at Karanje, Near)
Magarwadi, Tal. Baramati,)
Dist. Pune.)
4.Smt.Shashikala Sitaram Khaire)
Age 93 years, Occ.Household)
residing at Post Kodit (Saswad)
Taluka Purandhar, Dist.Pune)
5.Smt.Jijabai Vishnu Kunjir,)
Age 73 years,Occ.Household,)
6.Shri Dhyanoba Gajaba Kunjir,)
Age Adult, Occ.Agriculture,)
7.Shri Pandurang Laxman Kunjir,)
Age Adult, Occ.Agriculture,)
8.Shri Maruti Laxman Kunjir,)
Age Adult, Occ.Agriculture,)
9.Shri Raghunath Laxman Kunjir)
Age Adult, Occ.Agriculture,)
10.Smt.Subhadra Laxman Kunjir,)
Age Adult, Occ.Agriculture,)
11.Shri Sonba Dashrath Chavan)
Age Adult, Occ. Agriculture)
12.Shri Dattatray Bhikaji Ingale)
Age Adult, Occ.Agriculture,)
13.Shri Dattatray Shripati)
Lawande,)
Sr.No.5 to 13 all residing at)
Waghapur,Chaufala, Tal.Purandhar)
Dist. Pune.)..RESPONDENTS

Mr. S.J. Rairkar, for the Petitioner
Mr.S.A. Sawant for Respondent NO.1.

CORAM: F.I. REBELLO, J.
DATE : 4th May,2005

JUDGMENT:

. Rule. By consent heard forthwith.

2. Though the respondent Nos. 2 to 13 are parties, the order arises out of the say filed by Defendant No.1 i.e. respondent No.1 who is represented before this Court. Notice on the other Respondents, therefore, dispensed with.

3. The petitioner, is the original plaintiff in the pending suit being Regular Civil Suit No.166 of 2001 filed in the Court of learned Civil Judge, Junior Division, Saswad. The reliefs sought for is that as the properties are ancestral and/or purchased out of the nucleus of the joint family properties they are liable to be partitioned. The respondent No.1 filed written statement-cum-reply to the application for temporary injunction on 8th November, 2004 wherein defence is set out. The respondent Nos. 3 to 5 have adopted the written statement filed by the respondent No.1. There are some inter se disputes as to the procedure of filing written statement between Respondent Nos. 2 and 4 on the one hand and Respondent Nos. 3 and 5 on the other. The controversy to that extent was resolved by an order dated 6th March, 2004 passed by the trial Court. It is the case of the petitioners that on 12th February, 2004 the Respondent Nos. 3,4 and 5 filed 3 separate affidavits incorporating similar contents as taken by them in the application made by them at Exh.78. The defence raised therein are thereafter set out in the

pleadings. Evidence by way of Examination and cross examination including leading of oral and documentary evidence has been partly done.

4. On 29th September, 2004 the petitioner moved an application in the suit seeking permission of the learned trial Judge to cross examine the respondent Nos. 3 to 5. That came to be opposed by Respondent Nos. 3 to 5. The learned Judge by his impugned order dated 1st October, 2004 rejected the application for cross examination. It was contended that affidavits are not in lieu of examination in chief in the suit. The Court made reference to the provisions of Order 19 Rule 2 of the Code of Civil Procedure which was not at all applicable. It is this order which is the subject matter of the present challenge.

5. At the threshold it may be pointed out that the contesting Respondent has been unable to defend the said order. Once the affidavits are filed by way of examination in chief, law permits the party who is entitled to cross examine the witnesses to do so. For that purpose we may now consider the relevant provisions of Order 18 of C.P.C.

. Order 18 Rule 4 before its amendment read as under:-

"4. **Witnesses to be examined in open**

Court--- The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge."

By the Code of Civil Procedure (Amendment) Act 1999 the said Rule was sought to be substituted. The relevant portion of which reads as under:-

"4. *Recording of evidence by commissioner.-* (1) In every case, the evidence of a witness of his examination-in-chief shall be given by affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken orally by a Commissioner to be appointed by the Court from amongst the panel of commissioners prepared for this purpose on the same day;

Provided that, in the interest of justice and for reasons to be recorded in writing, the Court may direct that the evidence of any witness shall be recorded by the Court in the presence and under the personal direction and

superintendence of the Judge."

The Act of 1999 also provided for addition of another Rule after Rule 18, Rule 19 which reads as under:-

> *"19. Power to get statements recorded on commission.-* Notwithstanding anything contained in these rules, the Court may, instead of examining witnesses in open Court, direct their statements to be recorded on commission under rule 4A of Order XXVI."

This rule subsists.

After the Act of 1999, came the amendment by the Amendment Act of 2000 which made further changes in Order 18. In so far as Rule 4 is concerned, the relevant portion as amended reads as follows:-

> "4. *Recording of evidence.*-- (1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:
>
> Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court (other than the High Court), shall be taken either by the Court or by the Commissioner appointed by it;

Provided that the Court may, while appointing a commission under the sub-rule, consider taking into account such relevant factors as it thinks fit;

Provided further that in a suit tried by the High Court, the evidence shall ordinarily be recorded by the Commissioner unless the Court directs otherwise."

. For discussion we may also reproduce Order XVIII Rule 5:-

. "**5. How Evidence shall be taken in appealable cases**-- In cases in which an appeal is allowed, the evidence of each witness shall be.--

(a) taken down in the language of the Court,--

(i) in writing by, or in the presence and

> under the personal direction and superintendence of, the Judge, or
>
> (ii) from the dictation of the Judge directly on a typewriter; or
>
> (b) if the Judge, for reasons to be recorded, so directs, recorded mechanically in the language of the Court in the presence of the Judge."

From consideration of Rule 4 as it stood before the amendment Act of 1999 as substituted by the Act of 1999 and then by the Act of 2000, it appears that it provides that in all cases examination in chief of witnesses shall be on affidavit. Rule 5, however, continues to operate and if read with Rule 4, it may appear that Rule 4 only applies to cases where no appeal lies. Rule 19, however, permits the Court to record evidence on commission under Rule 4A of Order XXVI. In other words the procedure for recording evidence in Court by the Judge can be dispensed with in all cases. We are, however, considering the issue of recording evidence on affidavit to consider the legality of the order.

6. The question which, therefore, emerges is how will this evidence be recorded on affidavit. Law, it is said, gains by experience. Though a short period

of time has elapsed, experience gathered by Courts in recording of evidence on affidavit indicates that affidavits are drafted in Lawyer's Chambers without the witness being examined by the Lawyer and a true transcript of the evidence being set out in the affidavit. Cases are coming up before the Courts where witnesses are unable either to depose to the facts as set out in the affidavit or even display any knowledge on what is set out in the affidavit. The result, therefore, is that on many an occasion evidence of such witnesses has to be discarded and/or its evidentiary value is put in doubt. Was it the purpose and intent of Parliament that by doing away with the examination in chief in the Court and replacing it by evidence on affidavit, meant that the affidavit has to be prepared without examining the witnesses and recording his statement and then transcribing the relevant evidence on affidavit on oath.

7. Order 18 Rule 4 as it stood before its substitution by Act of 1999 and 2001, provided that the oral evidence of the witness had to be recorded in the presence of the Judge. By the amendment it is now to be recorded on affidavit. Earlier it had to be recorded in the manner set out in Rule 5, which was, to take it down, in the language of the Court in writing or in the presence and under the personal direction and superintendence of the Judge or from the dictation of the Judge directly on a typewriter

or if the Judge for reasons recorded,directs to be recorded by a mechanism in the presence of the Judge. The purpose and object of the Amendment Acts have been considered by the Apex Court in Salem Advocates Bar Association v.s Union of India, AIR 2003 SC 189. The object of amending Order 18 Rule 4 is to subserve the larger purpose of cutting down in the disposal time of recording evidence, thereby reducing the period of disposal of the cases by dispensing with the lengthy procedure of the Court recording evidence of every witness produced before it or summoned to appear before it. The earlier procedure resulted in the trial being inordinately delayed and was one of the main reasons for the docket explosion in the Courts. The amendment seeks to obviate the same by permitting examination to be on affidavit instead of the examination-in-chief being recorded by the Court.

8. The objective of speedy disposal of trial of the case by allowing examination-in-chief to be recorded on affidavit does not mean that the procedure of recording of evidence of the witness has to be by-passed or dispensed with, by filing the affidavit without examining the witnesses as is the popular notion. All that has happened is that instead of recording the evidence before the Court, the duty is now placed on the legal profession, thereby meaning Advocates appearing for the parties to follow the same procedure in their Chambers meaning thereby that they have to personally examine

the witness and get his statement recorded in his presence by one of the modes earlier set out under Order 18 Rule 5 and then transcribe the same on an affidavit which is to be filed in the Court. Dispensation of oral evidence, by way of examination-in-chief therefore, is not dispensation of the procedure for recording evidence. The place of recording evidence has only changed. The procedure for recording evidence even at the stage of examination in chief remains substantially the same. Even before the amendment Act of 1999 and 2000 it was open to the Court, under the provisions of Order 19 R (1), (2) to permit evidence to be recorded on affidavit. This was discretionary. It is now made mandatory under Order 18 Rule 4 of C.P.C.

. Having considered the object and purpose for which the amendment has been brought about it would be clear that an affidavit cannot be filed by way of examination in chief where the evidence of the witness has not been recorded by the Lawyer or Lawyers representing the parties and then transcribing the recorded evidence on an affidavit. Any affidavit has to be varied in terms of Order 19 Rule 3. Under the provisions of Order 18 Rule 5 the statement of the witness has to be recorded in writing or by taking it down on typewriter or by any mechanical process including recording it on a tape or on computer or any other mode that may be permissible for the purpose of recording evidence.

It is only after such recording the evidence recorded has to be transcribed and put on affidavit. An affidavit not following this procedure is not the affidavit contemplated and will have to be rejected. It is no doubt true that there is no express provision in the C.P.C,. pursuant to the substitution of Order 18 Rule 4 which specifically sets out the procedure as now held. However, though not specifically provided it can be inferred bearing in mind the intent and purpose for which the amendment has been brought about and the provisions of the C.P.C. Under Order 19 Rule 3, the affidavit had to be confined to such facts as the deponent is able of his own knowledge to prove under Order 19 Rule 3, the costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, etc., has to be paid by the party filing the same. It is settled law that the verification clause in the affidavit must clearly specify which statements are made on knowledge. Affidavits not properly verified can be rejected. See **A.I.R. 1970 S.C. 652 A.K.K. Nambiar vs. Union of India & Anr.** The purpose apart from speeding the trial is to complete the process of examination in chief of witnesses by the Lawyer or Lawyers as the case may be. Even before the amendment, the Code provided for the manner in which an affidavit has to be recorded and verified as set out earlier. In my opinion, therefore, all affidavits of witnesses by way of examination in chief under Order 18 Rule 4

must be prepared, affirmed and filed in the manner discussed in this judgment and the affidavit may also contain a statement by the witnesses that the affidavit has been prepared based on the evidence deposed by him, before the persons who has recorded his evidence. In that event the name shall be disclosed. Needless to say such recording of evidence can only be by a Lawyer or Commissioner appointed under the Code of Civil Procedure and to ensure protection both to the Lawyer and the witnesses the signed or initialled transcript must be maintained till the deposition is complete. This procedure is part of the trial of a suit.

9. It is made clear that this procedure is to be followed in Courts and Tribunals over which this Court exercises its supervisory jurisdiction and will be followed from 1st August, 2005.

10. Considering the facts of the present case and considering the substituted Order 18 Rule 4 once the affidavits are filed by way of examination in chief it was open to the plaintiff to seek cross examination. After cross examination is sought considering the imperative language of the Order the Court was bound to permit cross examination. Considering the above the impugned order dated 1st October, 2004 is set aside. The matter is remanded back to the trial Court to permit the petitioner’s to cross examine the witnesses whose affidavits have

been filed.

11. Rule made partly absolute accordingly. There shall be, however, no order as to costs.

12. The Registrar General of this Court to circulate a copy of this order to all the District Courts for circulation to all Courts and to Tribunals over which this Court exercises supervisory jurisdiction.

13. Parties to appear before the trial Court on 16th June, 2005 at 11.00 a.m. The trial Court to proceed in the matter by fixing a date for cross examination and thereafter dispose of the suit at the earliest.

(F.I.REBELLO, J.)